

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

VOLUME 6 (P.M. portion)

APPEARANCES:

COUNSEL FOR THE PLAINTIFFS:

Michael J. Allan
John M. Caracappa
Jeremy D. Engle
Paul Gennari
Margaret P. Kammerud
William G. Pecau
Stephanie L. Roberts
Jeffrey M. Theodore
Roger E. Warin
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Walter D. Kelley, Jr.,
HAUSFELD LLP
Suite 650
1700 K Street N.W.
Washington, D.C. 20006

COUNSEL FOR THE DEFENDANTS:

Andrew P. Bridges
Guinevere L. Jobson
Jedediah Wakefield
FENWICK & WEST LLP
555 California Street, 12th Floor
San Francisco, CA 94194

Brian D. Buckley
FENWICK & WEST LLP
1191 2nd Avenue, 10th Floor
Seattle, WA 98101

Craig C. Reilly
CRAIG C. REILLY, ESQ.
111 Oronoco Street
Alexandria, VA 22314

INDEX

<u>WITNESS</u>	<u>EXAMINATION</u>	<u>PAGE</u>
CHRISTOPHER SABEC by videotape		1311
RANDALL J. CADENHEAD	DIRECT	1328

1 NOTE: The afternoon portion of the proceedings on
2 December 9, 2015, begins in the absence of the jury as follows:
3 JURY OUT

4 THE COURT: Okay. Let's first discuss the report of
5 Dr. Poret. And I have looked in the report. There is nothing
6 in here about the math of the control questions.

7 So, Mr. Wakefield, how is that permissible?

8 MR. WAKEFIELD: Your Honor, we -- it was not
9 disclosed in his report, that calculation. That specific just
10 bit of division of one column had not been done at that time.
11 And, in fact, it hadn't been done at the time because we
12 understood when Dr. Nowlis described his methodology, that he
13 had done what he had said he had done. And it wasn't until
14 preparing -- I didn't understand this until last night in
15 preparing this direct examination what had happened.

16 And specifically, in paragraph 32 of his report, what
17 Dr. Nowlis said is that -- when describing his subtraction to
18 reach a net result, is that "the statistic of interest is that
19 the proportion of Cox Internet subscribers who download or
20 upload free digital music through sites such as ThePirateBay
21 for whom the ability to do so -- for whom the ability to do
22 this is a reason for subscribing to Cox Internet service."

23 So that's the relevant starting point, is the people
24 not just who say they do it, but for whom it's a reason.

25 Then he goes on to say, "to control for possible

1 survey noise, I included the two control questions. By
2 subtracting the higher control value from the statistic of
3 interest, I obtain a net result of the proportion of Cox
4 Internet subscribers who download or upload free digital music
5 through sites such as ThePirateBay for whom the ability to do
6 this is a reason for subscribing to Cox Internet service."

7 That's a little complicated, but what I understood
8 that to mean and what I think he was saying to the jury is I've
9 compared apples to apples. And it wasn't until just looking at
10 a spreadsheet that I saw and that Mr. Poret explained to me --

11 THE COURT: But you had his survey and deposed him on
12 the survey.

13 MR. WAKEFIELD: Right.

14 THE COURT: And you had opportunities to study it
15 then and ask him questions about it. Poret puts in his
16 response and he identifies his areas. And, of course, the most
17 important one was the fact that he didn't think you could reach
18 the conclusions that Nowlis reached, but he also had the survey
19 and he had critiqued the survey, but he hadn't discussed the
20 numbers in the control questions that he came out with on the
21 stand.

22 So that's how I frame the question, and why should I
23 let it in as a result.

24 MR. WAKEFIELD: So there was deposition questioning
25 about the numbers in the different groups, but not about the

1 division, not about reaching the percentage.

2 THE COURT: Because he never identified it as such.

3 MR. WAKEFIELD: Right. He indicated he had
4 criticisms of those controls and specifically about the fact
5 that you had different presentations of the numbers for the
6 control than the others, but not the numerator and denominator
7 piece.

8 THE COURT: Okay.

9 MR. WAKEFIELD: And it's my understanding that we
10 didn't know that at the time. It became clear after hearing
11 that testimony and then going back and looking.

12 THE COURT: Well, did you tell counsel you were going
13 to get into it this morning before court so that they could be
14 prepared to object if -- instead of in the middle of his
15 testimony and we could talk about it beforehand?

16 MR. WAKEFIELD: I didn't, Your Honor. Honestly, I
17 did think it fell within the scope of his general criticism of
18 the use of the controls and how they were applied to arrive at
19 this net, particularly when showing that everything else which
20 acts as a similar control subtracts out to reach a zero net
21 number. That was my assessment.

22 THE COURT: That was, you know -- that was -- as I
23 said before, that was significant testimony. And the fact that
24 he reversed the math that Nowlis had used, and how he explained
25 that it should actually be 80 percent versus 10 percent, that

1 was significant, I think, to the jury's consideration of what
2 weight to give the survey. And it hadn't been disclosed.

3 So, Mr. Pecau, you indicated you wanted a limiting
4 instruction. It is beyond the scope of the Rule 26 report. I
5 can strike it now. I can advise the jury that the answers
6 about those two control questions should not be considered.

7 The issue then becomes what are you going to ask
8 Nowlis, and are you going to get right back in the middle of
9 exactly this? So I am not sure how you massage that.

10 MR. PECAU: Well, you know, Your Honor, I mean, the
11 sharp dealing here is pretty astonishing --

12 THE COURT: Just answer my question.

13 MR. PECAU: Okay. Your Honor, I think what we would
14 like is a very strongly proposed -- strong instruction right
15 now to the jury saying that they should completely disregard
16 Mr. Poret's testimony regarding the control questions in
17 Dr. Nowlis' survey, and the jury should be instructed that
18 Dr. Poret's opinions were improper and were not disclosed by
19 Mr. Poret or Cox in violation of the Federal Rules of Civil
20 Procedure.

21 MR. WAKEFIELD: If I can respond on that, Your Honor.

22 MR. WARIN: Your Honor, Mr. Pecau has a copy.

23 MR. WAKEFIELD: May I take a look?

24 THE COURT: What were the two -- the subject matter
25 was the -- hold on, before I forget my question. The two

1 control questions that he flipped the math were what? Because
2 I think they --

3 MR. WAKEFIELD: They were the questions about
4 radioactive decay and choosing an avatar.

5 THE COURT: Right.

6 MR. WAKEFIELD: And this is -- this proposed
7 instruction is a bit of a grab bag that far exceeds that.
8 There were definitely criticisms about the controls and absence
9 of controls in the report. So I think if -- a limiting
10 instruction that says to disregard the testimony regarding the
11 calculations of the response rates for the two control -- the
12 numeric values to calculate the -- those questions, but
13 obviously he had a lot of other opinions about controls that
14 were disclosed.

15 And then the rest is getting into rulings that would
16 suggest somebody -- you know, it's essentially quite a sanction
17 to say his opinions were improper under the Federal Rules of
18 Civil Procedure -- seems completely unnecessary to the jury's
19 task.

20 MR. PECAU: Well, Your Honor, I think that in this
21 case it is necessary. The thing is that Dr. Nowlis' report was
22 on June 16. And the fact is that he was deposed and he didn't
23 reveal this. He -- they had a Daubert motion. They didn't
24 reveal this. And even more than that, Your Honor, is just the
25 sharp way that this thing was put in. And how was it put in?

1 In every other expert we have had, we have had demonstratives.
2 Particularly when you have very complicated numbers like this.
3 I still don't know how they figured this out. But there is no
4 demonstrative which would have given us some warning. We
5 certainly didn't get any warning this morning.

6 And the way that this knife was slipped into us, he
7 asked a broad question, and he got a huge narrative answer.
8 This thing was a complete set up, Your Honor, and we think that
9 the instruction should reflect what actually happened here.

10 THE COURT: Okay. All right. Well, I am going to
11 tell the jury that it was because it was a lack of disclosure
12 beforehand, and that it can't be considered for that purpose.
13 I am not sure whether that doesn't even soften the instruction
14 because they are going, well, it's probably true, but it wasn't
15 legit under the Federal Rules, so we are supposed to disregard
16 it now?

17 MR. PECAU: Your Honor, that's the whole thing.
18 That's why it was a slipped in here. I mean, it was a no-lose
19 proposition for them. They didn't disclose it in any way. And
20 they wanted to get it in front of the jury to create confusion,
21 to cast doubt.

22 And, Your Honor, we realize that the cat can't get
23 out of the bag, and that's why we think that it is appropriate
24 to have a very strong, very broad instruction.

25 THE COURT: Okay. I am going to give an instruction

1 that will tell them not to consider it. Tell them that as to
2 the calculations made in the -- on the control questions in
3 particular, the radioactive decay and choosing an avatar, that
4 it was not information which had been supported in an expert
5 report as is required. So that it may not be considered under
6 any circumstances.

7 All right. Let's go to the advice of counsel. I
8 have looked at the e-mails. I struck advice of counsel because
9 it wasn't timely. And now I have got a bunch of e-mails where
10 you want to put in the fact that Cadenhead gave advice of
11 counsel and he is identified as the legal counsel. And how is
12 that permissible in light of the way you responded to the
13 discovery requests?

14 Mr. Bridges.

15 MR. BRIDGES: Your Honor, we never interposed an
16 advice of counsel defense. We did not.

17 THE COURT: This is advice of counsel, right? These
18 are -- this is Cadenhead saying, we are not going to send these
19 notices to our customers because it is extortionate demands.

20 MR. BRIDGES: Your Honor, the issue here is that
21 Mr. Cadenhead was acting as a principal. He was making
22 decisions for Cox.

23 THE COURT: He is the attorney making business
24 decisions for Cox? He is giving advice as counsel, right?

25 MR. BRIDGES: No, Your Honor. He was not writing

1 memos. The Court --

2 THE COURT: Well, who does Cox believe made the
3 decision not to accept these notices? What is your evidence
4 going to be on that?

5 MR. BRIDGES: His testimony will be, I made the
6 decision.

7 THE COURT: All right. He is the counsel.

8 MR. BRIDGES: Your Honor, many in-house counsel have
9 business functions and have business responsibilities. He
10 was --

11 THE COURT: What disclosure did you make about the
12 nature of his testimony in response to any interrogatory? I
13 mean, and did you identify him as a fact witness?

14 MR. BRIDGES: I am sorry, I don't recall what was in
15 interrogatory responses. But we consciously, and during the
16 discovery period when this issue came up, when they were trying
17 to say that we were doing an advice of counsel defense, we said
18 we don't want to have this fight, we will waive privilege so
19 that everybody can see what it was.

20 But if the Court would actually see some of these
21 documents, documents that they have included themselves, there
22 was a process, a negotiation going on between Rightscorp and
23 Cox. They called it a sales process, but their sales process,
24 Your Honor, was full of legal arguments. Okay. Full of legal
25 arguments.

1 And you heard Mr. Steele talk about all the law. And
2 Mr. Sabec, the CEO of Rightscorp, who was interacting
3 personally with Mr. Cadenhead, Mr. Steele is arguing the law.
4 And Mr. Cadenhead is responding saying, we don't see your world
5 the same way. But more importantly, Mr. Cadenhead is the
6 negotiator. He is the person directing the customer safety
7 team. And he says, block. And he is the order giver.

8 Now, Mr. Hauprich testified earlier he is a counsel
9 and vice-president of content or whatever. Many in-house
10 counsel have factual roles, not just mere advisory roles. If
11 Mr. Hauprich were to talk about signing an artist, signing
12 Taylor Swift or not, that's a fact issue.

13 So Mr. Cadenhead's role is like that.

14 THE COURT: Okay. So the difference is that he gave
15 -- you want to allow him to give a legal opinion that Cox was
16 not required to send these notices on because of the settlement
17 demand within the notice. That's an opinion of counsel.
18 There's no basis for it that has been identified. And that's
19 why, I presume, BMG sought to determine whether anybody had
20 done research or made any attempt to determine the
21 reasonableness of the position that Cox has taken. That's
22 what's missing here, right?

23 MR. BRIDGES: Your Honor, we don't need to couch
24 it -- Mr. Cadenhead -- these documents are not being offered as
25 legal argument at all. These are facts. These documents are

1 events that happened.

2 THE COURT: They include the opinion of counsel.
3 They include his opinion and his decision not to allow it. And
4 that's out there.

5 I mean, I don't know what Cox is going to make out of
6 that. You know, I sit here, and the way the case has come in,
7 the jury is really looking at it, is it reasonable for them not
8 to have sent the notices? Was there some excuse? They don't
9 understand where this is in the law. They don't understand
10 whether the settlement demand takes them -- takes Cox out of
11 the responsibility to send them or not.

12 And the way to answer that question is to have an
13 attorney say, I made the decision not to forward the notices
14 because the settlement demand, and BMG sought that information,
15 and you didn't give it to them.

16 MR. BRIDGES: Your Honor, we gave on a timely basis
17 information about the decisions that were made. And the fact
18 is, this was not legal advice on the side that was laundered
19 through a business person. He was -- he had the front line
20 responsibility of overseeing the actions of this team, and he
21 directed them. He wasn't advising them for them to consider
22 something or not. He directed them.

23 And, Your Honor, we have gotten so much law in this
24 case from Rightscorp. We have gotten wheelbarrows full of law
25 from testimony, extensive testimony by Mr. Steele. Their

1 documents.

2 They put in a document, Your Honor, I believe it's
3 Plaintiffs 2452, which is part of a long series of e-mails
4 between the sides, between Mr. Sabec and Mr. Cadenhead. And to
5 say that Mr. Cadenhead isn't allowed to explain why Cox
6 responded to Rightscorp on these issues, is to leave Cox with
7 no explanation, Your Honor. And in a case of this sort, merely
8 because the point person was a lawyer, and to say, you're not
9 allowed to explain yourself, would be having Cox with both arms
10 tied behind his back.

11 THE COURT: Well, what is his answer going to be to
12 why didn't you forward the notices on? Because you've
13 indicated it's by the settlement language. And why is that a
14 good cause?

15 MR. BRIDGES: He is going to explain, Your Honor,
16 that Cox had a policy, a policy of not forwarding settlements
17 like that because there had been two previous companies that
18 Cox had refused to forward those types of notices from.

19 So this was not some advice about, oh, Rightscorp,
20 this is something new. There had been decisions and practices
21 earlier, established practices at Cox that these notices fell
22 within.

23 THE COURT: And when he is asked what basis did Cox
24 have for those earlier decisions, what's his response going to
25 be?

1 MR. BRIDGES: There are several responses. First of
2 all, he felt it was inappropriate for Cox to forward notices
3 like those to customers.

4 In Rightscorp's case, Your Honor --

5 THE COURT: Answer my question. So the reasons he is
6 going to give are he thought it was inappropriate in those
7 other cases and what else?

8 MR. BRIDGES: And because these had -- these were
9 taking people to other Web sites with links, with passwords.
10 And Cox is very protective of its customer identities, and this
11 is sending Cox customers offsite to somebody else's Web site,
12 which is not a sound practice from any policy standpoint, Your
13 Honor. This wasn't --

14 THE COURT: Isn't that the customer's decision if
15 they get the notice?

16 MR. BRIDGES: And it's the ISP's decision not to make
17 the customers vulnerable in that fashion. And Your Honor, the
18 testimony -- I think these things will become clear as the
19 testimony unfolds.

20 The redirect option that Rightscorp suggested to Cox
21 was untenable for several reasons. And one of them is, we
22 don't redirect our customers to somebody else's Web site.

23 In the world of web linking and the like, when you
24 think you're on a site and you get sent to another person's
25 site without opting to do so, that is a serious significant

1 issue.

2 THE COURT: That's not what the DMCA requires, and
3 that's not what was being demanded here of Cox. So that's
4 totally irrelevant to our discussion. It may be a reason as a
5 policy never to allow your customers' information to come out.
6 And if the risk of some customers' information safety is so
7 paramount that that's Cox's policy on everything that they do,
8 then that -- you know, that doesn't -- even that doesn't, you
9 know, get you a denial of -- because it's the customer's
10 decision, and they are the ones that have to voluntarily
11 communicate with Rightscorp, right?

12 MR. BRIDGES: Not necessarily with a redirect page,
13 Your Honor. That would not be voluntary.

14 And, Your Honor, I understand these sound like
15 points, but these are points I think for the jury to hear. And
16 if Cox says, we don't forward them because of some reason, and
17 we understand -- the DMCA is out of this case.

18 THE COURT: Right.

19 MR. BRIDGES: Okay. The DMCA is out of this case.
20 There was a reason that Cox wasn't forwarding these settlement
21 demands, because they were improper.

22 Now, yes, he may have said outside the spirit of the
23 DMCA, but with the DMCA out, they are still improper. They are
24 still improper.

25 And, Your Honor, I cannot stress enough, Cox needs to

1 be able to explain its actions. And the person who engaged in
2 the actions is the person to explain them.

3 THE COURT: Well, as you've stated, that is out there
4 already, that he told them not to do that. The issue that is
5 before me is should he be allowed to explain as counsel why he
6 made that decision. So -- all right. You and I have talked
7 enough.

8 Does BMG want to respond?

9 MR. KELLEY: Just briefly. I think we've gotten
10 pretty far afield from the issue that we spotted.

11 The particular documents that we gave to you were
12 internal Cox documents, they weren't the back and forth with
13 Rightscorp. We haven't objected to that. That's going to be
14 discussed. And what they are is Mr. Cadenhead opining about
15 what the DMCA does or doesn't do. And so, those are the ones
16 that we think should not be introduced.

17 If they want to redact them, if they -- I don't know
18 how you do it, maybe you could, but that's what we have a
19 problem with. And it's just that simple and just that narrow.

20 THE COURT: What's your -- you've listened to
21 Mr. Bridges and I talk about his testimony, what he's going to
22 say about the reasonableness of his decision not to forward the
23 notices.

24 What's your position on the explanation that he is
25 likely to give?

1 MR. KELLEY: Well, I don't know exactly what he is
2 going to say because everything up to now has been the DMCA
3 doesn't allow it, they are against the law, blah, blah, blah.
4 If he comes up with some new reasons that he doesn't like them,
5 then I guess I've got to deal with the new reasons.

6 THE COURT: You think that's permissible testimony?

7 MR. KELLEY: Well, it's all wrapped in together, is
8 the trouble. It's a riddle inside of an enigma, whatever the
9 Winston Churchill thing is. So I have a hard time seeing how
10 exactly you fairly cross him on it.

11 THE COURT: Okay.

12 MR. KELLEY: And the other document is just this
13 Copyright Alert System thing that I thought we had already
14 dealt with.

15 THE COURT: Yeah. All right.

16 MR. BRIDGES: Your Honor, if I may, just a couple
17 things. As the Court said, this has been out in the air with
18 the jury. And so, to me that's also an argument that on -- I
19 mean, we've heard DMCA and seen documents on DMCA many times so
20 far I think in this case. And so, there's a serious open door
21 issue.

22 But I think that the critical thing here is that he
23 is the percipient witness who participated in internal
24 communications and external communications.

25 THE COURT: Was he deposed?

1 MR. BRIDGES: Oh, absolutely, Your Honor, absolutely.

2 And the other last point I'll make is let's take at
3 face value a concern about his statement that something was
4 outside the DMCA. Okay. Then let's put all the DMCA over to
5 one side, as the Court has done.

6 Then there's a question, I've got something
7 regardless of the DMCA, what do we do? And when he says, it's
8 outside the spirit of the DMCA, he's making a decision about
9 what to do outside the DMCA. And that's an authoritative
10 decision he could make in his role overseeing the customer
11 safety team, Your Honor, because it was about customer safety.

12 THE COURT: Okay. All right, Mr. Caracappa.

13 MR. CARACAPPA: Your Honor, do you mind if I address
14 the issue about his deposition, because I took the deposition?

15 THE COURT: Yes.

16 MR. CARACAPPA: And throughout this entire case they
17 have said they are rejecting Rightscorp's notices for one
18 reason, and it's because it's outside the scope of the DMCA --
19 the spirit of the DMCA. That is it. And now what they're
20 saying, well, now we're going to have him come up with some
21 other reasons.

22 And his depo testimony and all the fact discovery is
23 very clear, it was one reason. They're outside the spirit of
24 the DMCA, and that's it. And now they're trying to change the
25 record and the testimony, and that's what they're going to try

1 and do through Mr. Cadenhead.

2 MR. BRIDGES: Your Honor, he seized on one phrase,
3 and he now says that's the only phrase that was ever used.

4 THE COURT: Well, what does his deposition say? Do
5 you have that?

6 MR. BRIDGES: I can get that. Settlement amounts
7 have a lot to do with it.

8 THE COURT: Settlement amounts, \$10 and \$20?

9 MR. BRIDGES: Settlement amounts and --

10 THE COURT: The fact that they hadn't identified that
11 there had been an actual infringement versus an allegation of
12 infringement?

13 MR. BRIDGES: I'd love -- actually, if we could one
14 thing, Your Honor, if you don't mind. I'd like to -- I want to
15 give the Court a good answer on this. I think it may be useful
16 if we could proceed because we don't want to hold the jury up,
17 if we could proceed with the Sabec video testimony and come
18 back to Mr. Cadenhead later, and I'll be able to explain to you
19 exactly what he said in the deposition.

20 THE COURT: All right. That's a great idea. Thank
21 you.

22 MR. BRIDGES: Thank you.

23 MR. ALLAN: Your Honor, I have one related point. If
24 it pleases the Court, I can discuss it now or we can discuss it
25 after the deposition.

1 THE COURT: Related to?

2 MR. ALLAN: Well, it's actually related to both
3 issues we've talked about this afternoon, with respect to
4 Mr. Cadenhead and with respect to Mr. Poret.

5 The next two witnesses -- well, a couple of the next
6 two witnesses are Mr. Matt Carothers and Jason Zabek. Matt
7 Carothers was the 30(b)(6) designee for the company on a number
8 of these topics, including Cox's policies and procedures for
9 notifying Cox's customers of infringement, actions that Cox has
10 taken or considered taking against its customers who have been
11 the subject of infringement notices. There's a litany of them.

12 I have a six-page, single-spaced list of transcript
13 sites where Mr. Carothers doesn't know the answer to a
14 countless number of questions about their policies and why they
15 do certain things. He was wholly unprepared for his
16 deposition. He didn't know, he didn't speak to Mr. Zabek --

17 THE COURT: Did you notify the Court and did Judge
18 Anderson rule on the fact that he -- did you bring a motion to
19 compel further testimony based on his inability to answer these
20 questions?

21 MR. ALLAN: We did not file a motion to compel, Your
22 Honor. We asked counsel if they would present Mr. Zabek, who
23 is clearly the most knowledgeable person about all these
24 policies, and they outright refused to do that. So --

25 THE COURT: So where are you going with the objection

1 now?

2 MR. ALLAN: Well, I think the issue --

3 THE COURT: What relief do you want?

4 MR. ALLAN: Well, I don't think Mr. Carothers or
5 Mr. Cadenhead or Mr. Zabek should be able to change the
6 testimony that Matt Carothers had produced or provided in this
7 case with respect to the various policies. I mean, it --

8 THE COURT: Well, is that going to occur in this
9 video deposition unless we rule on that?

10 MR. ALLAN: It won't occur in the Mr. Christopher
11 Sabec deposition, but it does implicate frankly every other Cox
12 witness they intend to call.

13 And we have a -- we put together a quick memo on
14 this, Your Honor. We were thinking this might come up. I'm
15 happy to hand it to you with a copy of the transcripts and
16 obviously counsel as well.

17 THE COURT: All right. That would -- yes, Mr. Warin.

18 MR. WARIN: Your Honor, I have a question about the
19 Christopher Zabek deposition. We had asked both during
20 discovery and during the course of this trial whether or not
21 Mr. Zabek would be available at trial. We were told no --

22 MR. CARACAPPA: Mr. Sabec --

23 MR. WARIN: Oh, Sabec? Oh, I'm sorry. My mistake, I
24 made the Z an S thing. Sorry, Your Honor.

25 THE COURT: Okay. All right. Then I'll -- you have

1 got a copy for Mr. Bridges?

2 MR. ALLAN: Yes, of course. Yes, yes, Your Honor, I
3 do.

4 THE COURT: All right. I'll look at that. I'd be
5 happy to look at it.

6 All right. Ready for our jury?

7 All right. Joe, let's get our jury.

8 NOTE: At this point the jury returns to the
9 courtroom; whereupon the case continues as follows:
10 JURY IN

11 THE COURT: All right. Please be seated.

12 I apologize for the delay. We've been working out
13 here and I think I said I'd try to limit these to when you're
14 not sitting in the back room so that we don't delay it, and
15 sometimes it works and sometimes it doesn't.

16 But, you know, in any trial unexpected events occur
17 that require some time before you're allowed to return. So I
18 apologize. We'll keep it to a minimum. You know, we start
19 early before you get in often, and we stay late after you have
20 left for the evening to try and prevent delays in the testimony
21 during the day, but it's -- you know, issues come up.

22 Let me address Mr. Poret's testimony that you just
23 heard before lunch break. He was giving testimony regarding
24 Mr. Nowlis' -- I guess they are both doctors -- Nowlis' survey
25 and had certain criticisms of it. And one of the areas that he

1 discussed were the control questions, and in particular, the
2 radioactive decay control question, and also the choosing the
3 avatar question, and he criticized the use of those controls.
4 And he also gave you some numerical values which were at odds
5 with the numerical values that Dr. Nowlis had in his report on
6 those control questions.

7 You are to disregard that testimony. That testimony
8 that he gave had not been disclosed prior to the testimony he
9 gave today. And it doesn't matter why, it just wasn't
10 disclosed. Therefore, under the Federal Rules, it can't be
11 admitted into evidence.

12 So I realize that doesn't answer any -- or some of
13 the questions you may have about the reasons why, but the why
14 is not important for you really to -- I don't want you to
15 speculate on the why. I want you to disregard that testimony.

16 I mean, he had some other testimony about control
17 questions which didn't involve the mathematical calculations.
18 You may consider that, but you're just not to consider the math
19 that he did with regard to those two controls. All right? All
20 right. Thank you.

21 We're going to have a video deposition presentation,
22 I believe. Is that correct, Mr. Bridges? Or -- Mr. Wakefield,
23 are you ready to play the deposition?

24 MR. WAKEFIELD: I hope so, Your Honor. Let me check
25 with the team. I got a thumbs up, so I believe we are.

1 THE COURT: All right. Let's go ahead with that,
2 please.

3 NOTE: Portions of the testimony of CHRISTOPHER SABEC
4 by videotape are played; at the conclusion of which the case
5 continues as follows:

6 THE COURT: Could you turn that off for a minute?
7 Turn that off.

8 Can I see counsel at the sidebar.

9 NOTE: A side-bar discussion is had between the Court
10 and counsel out of the hearing of the jury as follows:

11 AT SIDE BAR

12 THE COURT: I struck all that notification that went
13 out in the deposition.

14 MR. ALLAN: That all was out this morning.

15 THE COURT: That is all out.

16 MR. WAKEFIELD: Which point?

17 MR. ALLAN: Anything about "this is our lawsuit."

18 THE COURT: I struck all that.

19 MR. BRIDGES: He is -- let's go check with --

20 THE COURT: It's out, and that's all that is left is
21 what I considered to be --

22 MR. WAKEFIELD: My apologies for that. There was a
23 scramble to cut back there. I understood it had all been done
24 correctly, and I apologize for that.

25 THE COURT: I don't think there is anything in the

1 second volume but further notifications to third parties, and I
2 don't think that's relevant at all. So I struck it for that
3 reason.

4 And I will just tell them that the last notice to
5 that third party they saw shouldn't be considered, and our
6 video is over.

7 MR. WAKEFIELD: Okay.

8 MR. ALLAN: Thank you, Your Honor.

9 MR. REILLY: Thank you, Your Honor.

10 NOTE: The side-bar discussion is concluded;
11 whereupon the case continues before the jury as follows:

12 BEFORE THE JURY

13 THE COURT: All right. That last segment, that last
14 minute-and-a-half that you heard about a third party being
15 notified about the lawsuit -- these things are being done kind
16 of quickly before trial rulings are being made. I had struck
17 that last testimony as irrelevant to our lawsuit. And so, you
18 are not to consider it.

19 So that's the end of our video presentation of this
20 gentleman.

21 And we need to talk about one other matter. So can
22 we take like a ten-minute recess? Does that work?

23 All right. Thank you. Then you are excused.

24 NOTE: At this point the jury leaves the courtroom;
25 whereupon the case continues as follows:

1 JURY OUT

2 THE COURT: All right. Did counsel find the area
3 where Mr. Cadenhead was -- have a seat --

4 MR. KELLEY: If we can wait a moment and retrieve
5 Mr. Caracappa, because he is the one dealing with that.

6 MR. ALLAN: Your Honor, I do have a bench memo that I
7 can hand up to you beforehand.

8 THE COURT: Okay.

9 MR. ALLAN: And for Your Honor, I have got two
10 options concerning the portions of the deposition that we spoke
11 about. I am sorry --

12 In terms of the 30(b)(6) issue we discussed before
13 the video, Your Honor, I have copies of the depositions where
14 it's highlighted where Mr. Carothers doesn't know. I have the
15 exact same highlighted copy for counsel. I can hand that to
16 you if you'd like, or I can hand you a un-highlighted copy.

17 THE COURT: Okay. Yeah, when Joe gets back, let's
18 hand that up to me.

19 Joe, would you take the materials from Mr. Allan and
20 send them my way, please.

21 MR. ALLAN: I am also including, Your Honor, the
22 amended 30(b)(6) notice and Mr. Carothers' -- the topics on
23 which he is designated is set forth in one of the first pages
24 of his deposition.

25 THE COURT: Okay. All right. But let's discuss the

1 breadth of the Cadenhead testimony first.

2 And, Mr. Bridges, you wanted to look at the
3 transcript of the deposition and --

4 MR. BRIDGES: Yes, Your Honor.

5 THE COURT: And you and Mr. Caracappa have had a
6 chance to --

7 MR. BRIDGES: I have got one extra copy of the
8 deposition here.

9 THE COURT: And, of course, now we have heard the
10 testimony of Mr. Sabec where he says that he and Mr. Cadenhead
11 had talked, and that Randy had said that he would not forward
12 the notices with settlements because he believed that the DMCA
13 precludes that settlement language, and it's Cox's policy not
14 to forward them as a result.

15 MR. BRIDGES: That's correct, Your Honor. I think it
16 was at 18:34 in the deposition. The testimony was about Cox's
17 policy as conveyed by Mr. Cadenhead.

18 THE COURT: I'm sorry, what page?

19 MR. BRIDGES: Well, I'm sorry. I'm going from the
20 timestamp because I was watching it on the video, but that's
21 the Sabec -- I am not referring to the Cadenhead deposition
22 right now. I'm talking about the Sabec video we just saw.

23 On page 41 of this transcript it's a reference to the
24 fact that Cox did not want to do business with Rightscorp. And
25 bearing in mind that I think this was part of the theme that

1 Mr. Steele established in his testimony, that they were looking
2 for a business relationship. And these were business
3 negotiations, and maybe things were subject to negotiation.

4 Well, Mr. Cadenhead was the point person for the
5 discussions of the business relationship, and he was asked or
6 he testified about not wanting a business relationship and the
7 like.

8 THE COURT: Okay.

9 MR. BRIDGES: And I think --

10 THE COURT: I haven't heard -- I'm not sure that's
11 objected to. And those are not the subject of the exhibits
12 that BMG seeks to have excluded. It's the reference to Randy
13 is the one that made the decision not to forward these on.

14 MR. BRIDGES: Right. So a couple of things. I can
15 go through what I think --

16 THE COURT: You need to listen to me. I realize the
17 way you want to do things -- and I asked you a question a
18 second ago where in the transcript is the reference, and you
19 went off on the deposition.

20 So tell me where you believe Mr. Cadenhead provided
21 information that he was not merely relying on the DMCA not
22 allowing settlements and, as a result, Cox's policy was not to
23 forward them in the deposition.

24 MR. BRIDGES: Page 172 there is a reference to
25 rejection of the business proposal. And, Your Honor, I

1 apologize if I spoke too soon. So I do apologize for that.

2 THE COURT: I don't know. You know, I was taught
3 when a judge asks a question, you answer the question, and then
4 you try and amplify on it to make your point, but answer --

5 MR. BRIDGES: Page 172, Your Honor.

6 THE COURT: Yes.

7 MR. BRIDGES: Rejected the business proposal. And
8 page 187, that's a little bit different, that relates to the
9 Dashboard. You are asking about notices.

10 Page 83, Your Honor, and --

11 THE COURT: I'm sorry, what was the second? Oh, you
12 withdrew that? I'm trying to read as you're talking.

13 MR. BRIDGES: Okay. I will slow down.

14 THE COURT: I see it on 172. What else is it?

15 MR. BRIDGES: Rejecting -- page 83. And I caution
16 you, Your Honor, we're very aware of the Court's ruling about
17 the words "extortion" and "blackmail," but this was -- if you
18 look at page 83, these notices were improper for a variety of
19 reasons. And on page 83 he in his deposition refers to -- that
20 they were improper because they were extortionate or blackmail.

21 And what is interesting, Your Honor, is the question
22 here. "You concluded that Rightscorp's notices" -- this is at
23 the bottom of page 82. "You concluded that because the
24 Rightscorp notices had a demand for payment, they were not
25 proper take-down notices; is that correct? Answer: I'm sorry,

1 I think your question said I concluded they were not proper.
2 Proper is one word I would use, yes, or improper is one word I
3 would use.

4 "What's another word you would use? Answer: In
5 discussions within Cox, I believe I probably used the word
6 'extortionate' or even potentially akin to blackmail.

7 "Question: Is blackmail a legal term? No.

8 "Is extortion a legal term? No."

9 So here he was not opining on the law. He was
10 saying, these notices feel like extortion and blackmail to us.
11 And that's -- and that's right. He is not going to say that
12 from the stand, Your Honor, we have got him on that. But this
13 shows this was part of a broader business issue.

14 And again, the DMCA is out of the case, and he's
15 talking about considerations that are not in the DMCA.

16 THE COURT: Okay. No, we're talking about legal
17 opinions here.

18 Mr. Caracappa, where do you say that Mr. Cadenhead
19 limited his reasons for not forwarding the notices on to the
20 DMCA?

21 MR. CARACAPPA: Your Honor, I will refer you to the
22 same pages that Mr. Bridges just did, and I will put what
23 Mr. Bridges said into context. If you can start on page 83,
24 and you can look on page 84 and 85, Mr. Cadenhead clearly says,
25 the reason we ignored these notices is because they contained

1 settlement demands and they are, therefore, outside the spirit
2 of the DMCA.

3 THE COURT: Well, did you ever say that's the only
4 reason?

5 MR. CARACAPPA: Your Honor, we have been looking
6 through the deposition testimony for the past hour. There is a
7 couple of places -- and we can submit them to the Court. I
8 recall asking Mr. Cadenhead, is that the only reason? And he
9 basically said yes.

10 Now, I don't recall whether he said yes, but his
11 entire testimony is that these notices can be ignored because
12 they have settlement demands. When we sought discovery from
13 Cox, we said, all right, if you're relying on the spirit of the
14 DMCA, well, then we need to understand exactly what you think
15 the spirit of the DMCA is.

16 And they said, we are going to waive privilege only
17 with respect to settlement demands. And we asked for
18 privileged documents outside that scope, and we were denied
19 that request.

20 Mr. Cadenhead has never been offered as a business
21 person. There are hundreds of entries on their privilege log
22 with Mr. Cadenhead as an author. Almost every document has a
23 redaction in it. So Mr. Cadenhead is not being asked to
24 testify and has never been offered in his business capacity.
25 It has always been in his legal capacity.

1 THE COURT: Well, do they have to identify that? I
2 mean, where were they required to say if he was not going to be
3 offered as providing opinions of counsel, what notice was Cox
4 required to give?

5 MR. CARACAPPA: I don't know of any. But Cox can't
6 put him up to testify on business issues and shield every
7 single e-mail from Mr. Cadenhead on issues that it says, well,
8 in this correspondence he had his legal hat on, so we're going
9 to be able to redact it. But here he is going to have his
10 business hat on, and he is going to be able to explain to the
11 jury as a businessman what Cox did.

12 Having a lawyer on the stand, we believe, explaining
13 what Cox did is an implication that it is legal advice. Are
14 they not going to say that Mr. Cadenhead was an in-house
15 counsel at Cox?

16 I mean, having an in-house counsel from Cox explain
17 what his position was, I think a reasonable jury could say,
18 well, if it was from their lawyer, they must have had a legal
19 basis to ignore the notices. And the Court, we believe, has
20 already concluded that there is no legal basis to ignore those
21 notices.

22 THE COURT: Well, that's one of the issues that right
23 now the jury thinks that they are going to be ruling on,
24 whether the settlement offers were reasonable. As I said a
25 little earlier, the way the case has come in so far, Cox is

1 relying on the words "settlement," the existence of the
2 settlement information as their defense against at least, you
3 know -- as a total defense, I think, but at least as to whether
4 they willfully infringed for purposes of damages. And that
5 Cadenhead gave notice that he told people not to forward them
6 is certainly relevant to that willfulness issue if he believed
7 that the settlements were against the spirit of the DMCA.

8 But he can't give -- when you say that Cox waived as
9 to settlement, what do you mean by that? You mean, so they
10 provided these e-mails that I have now, or what did you take
11 that to mean?

12 MR. CARACAPPA: During the course of discovery they
13 relied on certain documents, they produced certain documents.
14 They produced certain documents after the close of discovery,
15 which is a different issue, but the documents they produced
16 during discovery, we moved to compel a waiver of the advice of
17 counsel and spirit of the DMCA. And we said, look, if you're
18 going to rely on the spirit of the DMCA, we need to know what
19 you think falls within the spirit of the DMCA and what falls
20 outside the spirit of the DMCA.

21 Cox said, no, the only thing we're waiving on is that
22 letters or notices with term -- with settlement demands are
23 outside the scope. You don't need to know anything else. You
24 don't need to know anything about how we're protecting our
25 customers because we don't want them to go to links.

1 We were prevented from getting any documents on those
2 issues. And when we moved to compel, Cox said, we are -- the
3 advice of counsel, and I'll quote, "the advice that Cox is
4 relying on is Mr. Cadenhead's advice that the notices that
5 contain settlement demands are not within the spirit of the
6 DMCA."

7 That's the advice. And that's what Cox said at the
8 hearing transcript on July 17, 2015, 15:20 to 22.

9 THE COURT: All right. So now we have testimony of
10 Mr. Sabec about his discussion with Cadenhead where he's
11 provided exactly that information. And I'm not sure if I'm
12 getting different signals. Mr. Kelley suggested that he just
13 wants these e-mails eliminated, and you seem to be saying that
14 you want Cadenhead to be excluded as a witness. And so where
15 are you there?

16 MR. CARACAPPA: Well, it guess it depends upon what
17 Mr. Cadenhead is going to say. If they are putting
18 Mr. Cadenhead up, who is a lawyer, and he is going to say,
19 regardless of what hat he was wearing when he made the
20 decision, that here are all the things and here -- that are in
21 the notice or notices and here is the reason why I rejected
22 them, because that's coming from a lawyer, a jury can
23 reasonably conclude, well, that's their lawyer and that's a --
24 it's reasonable to rely on advice from your lawyer.

25 THE COURT: All right. The jury is -- well, there's

1 a connection there that can't be made in the posture of the
2 case. But the jury has already been told it wasn't in the
3 spirit of the DMCA, the settlement offers were improper, that
4 this demand for \$150,000, if you, you know, don't listen to us,
5 you're subject to that kind of penalty, the jury already has
6 all of that. That's come in in your case and you're the one
7 that wanted the substance of the notices to come in and argued
8 that because it was electronic, the entire document -- so
9 that's all in there.

10 MR. CARACAPPA: Yes.

11 THE COURT: So Cadenhead and Cox have taken the
12 position that all that is reason to reject the notices. So if
13 he says that, are you going to be popping up and down if he
14 limits his testimony to what's in those notices?

15 MR. KELLEY: Your Honor, I think I can thread the
16 needle here. Obviously, he and Mr. Sabec, as you heard in
17 this, and also as Mr. Steele testified, they had a back and
18 forth.

19 THE COURT: Right.

20 MR. KELLEY: They had one phone call and a back and
21 forth e-mail exchange. We don't object to testimony about the
22 back and forth e-mail exchange. That's each of them staking
23 out their position.

24 What we object to is, number one, all the internal
25 communications where Mr. Cadenhead is telling them, do this, do

1 that, because of the DMCA.

2 THE COURT: Right.

3 MR. KELLEY: And then now coming in and offering
4 additional reasons. And what makes the cross-examination so
5 hard is to show that he never had any other reasons other than
6 the DMCA, I have to reveal the DMCA correspondence.

7 So that's the conundrum that I face in terms of
8 crossing. If the cross is limited to the back and forth and
9 what they said to each other and how'd you -- you know, what
10 was your impression of it, then that's fine.

11 THE COURT: All right, Mr. Bridges.

12 MR. BRIDGES: Your Honor, one of the things that the
13 testimony will show is that Rightscorp tried to get into Cox
14 about four or five different ways. They heard from Cox when
15 the notices came in. And then they went to a senior executive.
16 Then they went to somebody else. And then went to somebody
17 else. And their internal e-mails about what the communications
18 are back to Rightscorp. So that's the reason for internal
19 e-mails.

20 But I think it would be worthwhile if I could explain
21 the documents at issue since I think that's what's at issue
22 here.

23 THE COURT: Yeah, I've looked at them.

24 MR. BRIDGES: Okay. The one that they've objected to
25 is Mr. Cadenhead started getting notices as he was going off

1 into retirement. And so he was forwarding a batch that he got
2 at 1:00 in the morning on a Sunday to Ms. Trickey, who was
3 another lawyer, basically saying, here they are.

4 Now, yes, he was giving her what he had thought about
5 them, but the point is he was conveying them because they were
6 going to be on her watch.

7 There's direction from Mr. Cadenhead about blocking
8 SEGTech. That was a direction. It shows what his instruction
9 was.

10 There is one e-mail from Rightscorp to Cox that they
11 don't want. They say it maybe lacks foundation or something
12 like that, but -- these, Your Honor, are -- we're not -- we
13 don't want Mr. Cadenhead to be opining about the law. That's
14 out of the case. We just need for him as Cox's principal
15 person making these decisions to be able to explain it.

16 Thank you, Your Honor.

17 THE COURT: All right. I'm going to strike the
18 e-mails and also the exhibit which was objected to because of
19 the motion in limine 3, the deposition Exhibit 27, which is --
20 oh, it's DTX 0143.

21 I'll allow Cadenhead to testify about the business
22 end of the decisions he made. He's not going to go into
23 matters which did not -- which were not discussed in the
24 deposition, so he's limited to talking about what his belief
25 was at the time, which was the DMCA precludes settlements.

1 I think it's fair game for him to go into the fact
2 that the particulars of the notices and -- that I just went
3 over are included within that decision. But he's not going to
4 start making other justifications if they haven't been
5 disclosed.

6 This is a tough issue, I understand that, why the
7 parties have staked out the positions they have, but it's --
8 you know, it is powerful to have Cadenhead e-mails which are
9 providing legal advice when he hasn't been offered as a Cox
10 witness to testify on the opinion of counsel.

11 So that's my ruling. Your exception is noted. I
12 don't know where you want to go -- whether you want to call him
13 next or you want to call somebody else. But let's take five
14 minutes and come back and get our jury back.

15 All right. We are in recess.

16 NOTE: At this point a recess is taken; at the
17 conclusion of which the case continues in the absence of the
18 jury as follows:

19 JURY OUT

20 THE COURT: Is Mr. Cadenhead going to be the next
21 witness?

22 MR. BRIDGES: Yes, Your Honor. I believe he will.

23 THE COURT: And have you had an opportunity to
24 discuss with him what we've just been talking about?

25 MR. BRIDGES: Briefly. We've tried to make it clear.

1 THE COURT: Okay.

2 MR. BRIDGES: It's a fast instruction to him on short
3 notice, so I will do my best, and if he starts to go a place he
4 shouldn't go, then I'll try to do something to keep it from
5 happening, Your Honor.

6 THE COURT: All right. Thank you.

7 MR. BRIDGES: May I ask one question of
8 clarification? On the e-mails, one exhibit on that list was
9 the cover e-mail to Linda Trickey forwarding seven other
10 e-mails. I assume that those seven e-mails are okay? They
11 were attachments. They were all notices from Rightscorp.

12 THE COURT: Yes.

13 MR. KELLEY: The -- I don't -- I think some of them
14 are not BMG. They're other clients.

15 MR. BRIDGES: That's exactly right, and that's going
16 to be part of the point, Your Honor.

17 THE COURT: And what's the point you're trying to
18 make with that?

19 MR. KELLEY: I do have a problem with it then.

20 MR. BRIDGES: They were seven e-mails, four e-mails
21 the exact same minute as the BMG e-mail that came in at one in
22 the morning, a flurry of e-mails all saying exactly the same
23 thing. They were form letters, and it goes to what
24 Mr. Cadenhead's understanding was of those e-mails themselves.

25 There were five -- seven e-mails at one in the

1 morning over a five-minute period, all saying the same thing.

2 THE COURT: All from Rightscorp?

3 MR. BRIDGES: From Rightscorp.

4 THE COURT: To Cox?

5 I'm sorry, then I don't understand what you just
6 said.

7 MR. KELLEY: They're all from Rightscorp, but they're
8 not on behalf of BMG copyrights. They're various clients,
9 other clients of Rightscorp.

10 THE COURT: Okay. I'll permit that.

11 MR. BRIDGES: Thank you, Your Honor.

12 THE COURT: All right, Joe, let's get our jury.

13 JURY IN

14 THE COURT: All right, please be seated. So let me
15 update you on our schedule. I know that you're interested in
16 that. Tonight I'm going to have to break at 5:25 because at
17 5:30, I have a conference call with other judges about a
18 hearing I have next Monday in Richmond. It's a Court of
19 Appeals-type issue, where the hearing's been set for quite a
20 long period of time.

21 So we're not going to finish the evidence this week,
22 I do not believe. The lawyers are working as hard as they can
23 to get the case to you as soon as they can, but we're probably
24 not going to finish the evidence at -- I could be, I could be
25 pleasantly surprised. I don't think so based on their

R. Cadenhead - Direct

1328

1 estimates. And as I said, they're working hard to get the
2 case -- the evidence to you.

3 So we won't sit on Monday. On Friday, I have the
4 same situation I had last Friday, where I've got a 9:00 docket
5 and a 10:00 docket. I'm stripping it down to bare essentials,
6 so I'm going to try and do better about having us begin at
7 10:30 than I did last Friday. You know, the unexpected stuff
8 happens a lot, but I think I can get us going by 10:30 on
9 Friday morning.

10 So if we don't finish, we'll continue the testimony
11 on Tuesday, and I don't expect that it will go beyond Tuesday
12 and Wednesday of next week to get the evidence to you, and
13 we'll work real hard to make sure that gets done. All right?

14 All right, thank you.

15 All right, next witness, Mr. Bridges?

16 MR. BRIDGES: Your Honor, Cox calls Randy Cadenhead.

17 THE COURT: All right, thank you.

18 RANDALL J. CADENHEAD, DEFENDANTS' WITNESS, SWORN

19 DIRECT EXAMINATION

20 BY MR. BRIDGES:

21 Q. Good afternoon, Mr. Cadenhead.

22 A. Good afternoon.

23 Q. Please state your full name.

24 A. Randall J. Cadenhead.

25 Q. Where do you live?

1 A. I live in Decatur, Georgia, which is just outside of
2 Atlanta.

3 Q. I'd like to ask you a few questions about your background
4 before you arrived at Cox Communications.

5 A. Okay.

6 Q. Could you please describe your educational history?

7 A. I went to the University of Georgia for undergraduate
8 school, and then I went to the same school for law school and
9 graduated in 1979.

10 Q. What did you do after law school?

11 A. I worked for a year and a half in a law firm in Atlanta,
12 and then I took a job working for Southern Bell, which
13 eventually came Bell South and is now part of AT&T again.

14 Q. What work did you do there?

15 A. Most of my work -- I did a variety of legal work, but most
16 of it centered around the Yellow Pages business.

17 Q. What kind of issues did you address with the Yellow Pages
18 business?

19 A. A whole variety of things. I was associate general
20 counsel. But they included work on copyright issues and also
21 work on new ways to present the Yellow Pages in an electronic
22 format. I think we were trying to invent Google.

23 Q. If only it had.

24 When did you go to work at Cox?

25 A. I retired from Bell South in 2002, and I joined -- the

1 next year, I joined Cox.

2 Q. How did you get hired to work at Cox?

3 A. I had -- in a professional world, I had done work with the
4 general counsel at the time for Cox. They had had a
5 privacy-related problem, and in an area that I was familiar
6 with, and so I gave them some advice, and after I retired, he
7 called me one day and he said they were looking for someone to
8 work in the privacy area, and there I went.

9 Q. What position did you take at Cox?

10 A. Well, I was the privacy department for Cox. I was the
11 first person to have a role at all at Cox regarding privacy.

12 Q. Did Cox have a privacy officer at the time?

13 A. No, they didn't, and, in fact, I could have had the
14 title "privacy officer," but it wasn't as common as privacy
15 counsel at the time, so --

16 Q. What were your duties and activities at Cox as privacy
17 counsel?

18 A. Well, as the privacy department, it was to assure that
19 customer information was protected from any abuse internally,
20 especially any abuse externally, and it was also to help
21 educate the customers about how best to protect their own
22 information.

23 Q. Why was it important to protect -- to inform customers
24 about how to protect information?

25 A. We forget about the fact today, even though it's not been

1 that long, that people were just beginning to use the Internet
2 in a serious way, and the Internet is -- well, it reflects our
3 world, and so it has some dangerous places and some risks
4 associated with it, and one of my responsibilities was to work
5 on ways for customers to avoid those risks.

6 Q. As privacy counsel, what role did you have regarding the
7 handling of subpoenas?

8 A. I had responsibility for developing a system that could
9 manage a large number of subpoenas for customer information,
10 and then I, I helped refine that, I put together methods and
11 procedures, and then I did some management of it.

12 Q. What types of subpoenas did Cox receive?

13 A. Most of the subpoenas that we handled in the group that we
14 set up for this purpose were subpoenas for customer records.
15 The -- you don't have telephone numbers and telephone books for
16 the Internet; you have IP addresses; and those are relatively
17 invisible in the day-to-day world; and so we had to have people
18 in place -- when an IP address information would be subpoenaed,
19 we had to have people in place who could gather that
20 information and respond to the subpoenas.

21 Q. When you worked at Cox, roughly how many subpoenas did Cox
22 handle on a given year?

23 A. It grew to tens of thousands of subpoenas for customer
24 records.

25 Q. How important to Cox is customer privacy?

1 A. It's central to our relationship with the customer, our
2 commitment to the customer, and to our -- well, our compliance
3 with regulatory requirements as well. It's a primary function
4 of what makes up customer trust.

5 Q. How does Cox handle customer information?

6 A. We have an extensive -- well, let me stop for a second. I
7 say "we have." I forget I'm retired, and I hope you'll
8 understand, but we have an extensive data security organization
9 that I spent a good bit of my time working in.

10 Q. And what ways did Cox try to protect customer information?

11 A. We certainly did a great deal in terms of data security.
12 We did a great deal in terms of customer education because
13 without the customer's cooperation, it's immensely harder. We
14 also dealt with risks to the network that might find -- worm
15 their way in, if you will, into our systems and gather customer
16 information. Those are some examples.

17 Q. How long did you work at Cox?

18 A. For ten years.

19 Q. Why did you leave Cox?

20 A. My father retired at 59, and that was a goal of mine, and
21 I was fortunate enough to be able to do it, so --

22 Q. How have you been spending your time in retirement?

23 A. Well, I sail a lot. I have a grandson now, and I also
24 teach some at Emory Law School.

25 Q. What do you teach at Emory Law School?

1 A. I teach public interest practice. That's students who are
2 interested in careers and advocacy for public causes, nonprofit
3 work, legal aid, serving the poor, things of that nature.

4 Q. I'd like to ask you a bit about the customer safety
5 team --

6 A. Okay.

7 Q. -- at Cox.

8 Are you familiar with a group called a customer
9 safety team?

10 A. Yes, indeed.

11 Q. What other names has it had?

12 A. In the early years, it was called the abuse team or in
13 some cases the customer abuse team, which had the wrong
14 connotation, and so it ultimately was changed to customer
15 safety, which I think is a better term.

16 Q. What was the overall purpose of the team?

17 A. They served two goals. One was to protect the network,
18 because that's fundamental, and so they had a great deal of
19 engineer capacity, Internet safety materials, equipment,
20 monitoring that they did; and the second, the second was to
21 help the customer protect him- or herself over the Internet.

22 So this was a team of people whose -- actually, the
23 largest portion of their work were in customer interactions for
24 that kind of purpose.

25 Q. What standards did the team apply in the customer safety

1 team?

2 A. Our relationships with customers, first of all, were
3 governed by the terms of use and the authorized use policy, the
4 authorized user policy, which is the AUP, and those are
5 documents that I had a hand in preparing, and they set up the
6 terms of our relationship with customers. So they were to
7 enforce that -- those, and then also coincident with that, we
8 would develop -- I worked on methods and procedures for their
9 handling of things, and, of course, they had a great deal of
10 technical material and manuals and things of that nature that
11 they handled.

12 Q. Is the AUP also referred to as the Acceptable Use Policy?

13 A. Thank you. I'm sorry, I've been away a couple of years.
14 Thank you.

15 Q. What was the overall point of the AUP?

16 A. It's we -- it was our established relationship with the
17 customer as to what they could -- what they were allowed to do
18 with their Internet service.

19 Q. How did Cox communicate the Acceptable Use Policy to its
20 customers?

21 A. One of my responsibilities was to make sure that customers
22 did, in fact, have access to that. We sent it to every
23 customer every year, and then we also posted it on our Web site
24 and made mention of it in materials to customers -- online
25 materials to customers at times.

1 Q. For whose benefit did Cox create the Acceptable Use
2 Policy?

3 A. It was our -- it was the document that established our
4 relationship with our customer. It was for the two of us.

5 Q. What are some of the issues that the customer safety team
6 faced when you were at Cox?

7 A. We -- and I'll say "we" because part of my responsibility
8 was to help manage that group. We dealt with network dangers
9 on a daily basis. Denial of service attacks is one particular
10 example, and those are situations in which -- most often they
11 are situations in which you're flooded with so many
12 communications at once coming in from one or more sources that
13 you can't handle them. It's like all your phones ringing at
14 once or something like that, and you can't answer them. And
15 what it does very often is it triggers safety mechanisms in the
16 computers that make them shut down so no one can use the
17 service, and that's one example.

18 We also dealt with viruses that might attack our
19 systems and also viruses that -- and other threats that might
20 affect customers. For instance, there were often -- we dealt
21 constantly with spam-type messages which would come in and
22 would say, we're from Bank of America. Please send us -- we've
23 lost your record, or something. Please send us your log-in and
24 password in response to this e-mail.

25 And we worked very hard to block those and also to

1 educate customers not to do that sort of thing.

2 Q. What other types of threats did the customer service team
3 address? Can you think of others?

4 A. There are so many.

5 Q. What about physical threats?

6 A. Yes. There were physical threats in the form of physical
7 threats to the network, to our facilities, so we had to
8 coordinate with other groups for those. There were physical
9 threats to individuals in the company and also to customers,
10 and so we spent time dealing with those kinds of things as
11 well.

12 Q. What role did the customer safety team have regarding
13 allegations of copyright infringement?

14 A. As time passed, in some measures, that actually became 90
15 percent of their work. They, they were the -- they established
16 the systems to receive notices from copyright holders, to
17 process and track those, to forward them to customers, and then
18 most importantly really, to interact with the customers, to try
19 and deal with whatever was causing them to receive these
20 notices.

21 Q. I'd like to ask a little bit about the staffing --

22 A. Okay.

23 Q. -- of the customer safety team.

24 Who's on the customer safety team? What kinds of
25 persons or jobs are those?

1 A. It was led in the headquarters operation by a group of
2 engineers, appropriately, because it's a very technical
3 business. There were also a number of customer facing,
4 customer service, if you will, individuals at two levels who
5 were trained to help the customer address the kinds of issues
6 that were affecting them.

7 They might call up because their Internet service
8 just didn't work, but they also might call up and did very
9 often because they had received a take-down notice, a notice of
10 infringement of a copyright, and didn't understand what it was
11 or why they had gotten it and, most importantly, what to do to
12 deal with it.

13 Q. Who headed the customer safety group when you were at
14 Cox -- when you arrived at Cox?

15 A. Okay. When I first came to Cox, thank you, Matt Carothers
16 headed the organization, and he's actually the person who
17 established the computer system that we developed, first of its
18 kind, to manage the notices that were coming in.

19 Q. With whom in the customer safety group did you primarily
20 interact?

21 A. I dealt with each -- I dealt with each of the headquarters
22 people, in the headquarters -- the engineers in the
23 headquarters team on a regular basis, fairly often.

24 Q. What training or information was available to members of
25 the customer safety team in performing their jobs?

1 A. Well, apart from the knowledge and experience it took just
2 technically, I developed -- with their assistance, I developed
3 methods and procedures for handling many of the issues that
4 they, that they had. I also developed some of the materials,
5 many of the materials that they would share with customers
6 about how to fix issues that were causing things like these
7 notices that came in.

8 Q. Can you give some examples of different interactions that
9 you had with the team, things that they called on you for over
10 the time?

11 A. I never -- they were good at their job, first of all, and
12 they were the best ones to deal one-on-one with customers, so I
13 never interacted with a specific customer. That was their job,
14 and they did it well.

15 What I did was set standards, policies for the level
16 of response, the type of response, really, that they would have
17 in given situations.

18 Q. Can you give examples of particular types of standards?

19 A. Yes. As we were -- talking about the copyright
20 infringement area, as we were working on our graduated response
21 program with its various steps and the like, they would come to
22 me with their experience and try and get some insight into how
23 to make the system work more effectively, and so I would, I
24 would set the policy that said that, for instance, the first
25 online interaction that a customer might have would be an image

1 on their browser screen, and they could click out of that, and
2 that would be -- and that's what we called a, a soft walled
3 garden, which is just an image on the screen. They could see
4 that and click, and it would go away.

5 And then the next thing they would see would be a --
6 the same screen, and it would say the next time a notice came
7 in, they would see that and say, "You need to call us. You've
8 got a problem."

9 Q. I'll get to that whole process in a little bit.

10 A. Okay. Thank you.

11 Q. Thank you. I think you used the term "graduated response
12 process." What does that mean?

13 A. That's a long way of saying a step-by-step process that
14 escalates the level of interaction that we have with a customer
15 when the same issue keeps coming up.

16 Q. Can you give me a general overview -- and I'll get to some
17 specifics later --

18 A. Okay.

19 Q. -- but can you give me a general overview of Cox's process
20 of handling copyright accusations?

21 A. Yes, I can. As the -- in the early years, the notices
22 that we received were infrequent, but the peer-to-peer file
23 exchange world began to develop, and so notices came in more
24 and more, and we, with the great assistance of Matt Carothers,
25 began to develop this graduated response program where it

1 wasn't enough just to send on to the customer the information
2 that we received, but rather, we developed materials to send to
3 the customer, and the whole purpose of the process, which it
4 sounds like you're going to get to, but the whole purpose of
5 the process was to address with the customer the issue and
6 whatever was causing it, to get the customer to correct the
7 problem.

8 Is that --

9 Q. Thank you.

10 A. Okay.

11 Q. What values did Cox try to build into the process?

12 A. We were kind of in the middle. We were providing the on
13 ramp to the Internet for the customers without -- we had no
14 control over where they went, but what we had in terms of
15 values in addressing the customer concerning these issues were
16 first concern about the growing problem of copyright
17 infringement on the Internet.

18 These were the years, it's not that long ago now, but
19 these were a different time, when it was a little more Wild
20 West on the Internet, and there were some people taking
21 advantage of new programs and the like, and we recognized that
22 and the importance of dealing with it in a lot of ways, and
23 maybe we'll get to those, but that was the first value.

24 The second value was respect for the customer. The
25 third value was educating the customer, because again, there

1 were a lot of people then and really still are today who don't
2 quite understand some of the dangers on the Internet.

3 And so we were trying to use those standards, those
4 values to -- not to just leave things as they were, but to make
5 things better.

6 Q. What technology did Cox use to implement its procedures?

7 A. I mentioned the work that Matt Carothers had done in
8 developing a computer system. Not very few -- just a very few
9 years ago, let's say five or six, there were still Internet
10 providers who received notices from copyright holders claiming
11 infringement that came in by mail, postal mail, sometimes by
12 fax, and they would manually handle those, put them perhaps in
13 a spreadsheet, and then manually mail them to the customer, and
14 we knew that wasn't going to work, and we were fortunate enough
15 to have Matt, and he spent the time to develop the CATS system,
16 Customer Abuse -- pardon that term -- Tracking System, and it
17 was a computer system that was established to receive the
18 e-mails that would come in with notices into an e-mail address,
19 electronically read them, track the receipt of them, and also
20 track what -- take other databases and determine what customer
21 that was relating to, put that information in the customer's
22 file, and then go so far as to forward on the information, the
23 notice, to the customer, with a cover message.

24 It was very effective, and actually over the years,
25 we actually licensed that program to some other ISPs for their

1 use to get them out of the 20th Century.

2 Q. When was CATS created?

3 A. It's around 2004.

4 Q. And what do you understand to be the reasons why Cox
5 developed it?

6 A. Cox, and in particular, I guess I'll use myself as an
7 example, recognized the growing issue about copyright
8 infringement on the Internet, it was something that we wanted
9 to try and do something about. There were regulatory reasons
10 that our hands were a little tied. We were also -- it was
11 really important that we not interfere with the customer's use
12 of the Internet. That was sacrosanct. So we tried to find
13 ways to try and work on this.

14 I actually reached out and spent a good deal of time
15 with industry representatives from the recording industry and
16 the motion picture industry, and we explored -- I shared
17 information about our system and how it worked and what kind of
18 results we were getting, and then we began to explore ideas
19 about how we might make some progress.

20 Q. I'd like to move forward a little bit to around 2010,
21 thereabouts.

22 A. Okay.

23 Q. What was the environment that you experienced at Cox and
24 on behalf of Cox between ISPs and entertainment companies
25 around that time?

1 A. We certainly were in different industries, but we had
2 similar interests. Among those, we had much the same
3 customers, and we also had -- we in the ISP world had an
4 interest in making sure that the Internet was a reasonably safe
5 place for people to go and to use, and the recording
6 industry -- I'll call them the recording industry -- was also
7 beginning to experiment with Internet solutions, if you will,
8 to offering their products. So it was -- it was a wary time
9 but also a valuable beginning of conversations.

10 Q. What do you remember about Cox's graduated response
11 process in that time around 2010?

12 A. Well, I have a general idea of -- and I could describe it
13 to you, but the specific details are probably a little, a
14 little fuzzy.

15 Q. What would help you refresh your recollection about those
16 details?

17 A. Well, I did a -- probably the best thing is that I did a
18 presentation to some of the industry group people and also to
19 other ISPs and in our company, too, that outlined our process
20 and the way it worked.

21 Q. Could you please look at Exhibit DTX 0141?

22 A. Okay.

23 Q. Can you please identify what the exhibit is?

24 A. Actually, this is a copy of a version of one of the
25 presentations that I presented internally and externally about

1 how we did graduated response at the time.

2 Q. Who prepared it?

3 A. Oh, I did.

4 Q. And is it -- did it contain accurate details to the best
5 of your recollection about the process as it existed then?

6 A. Oh, yeah, yes. Definitely.

7 MR. BRIDGES: Your Honor, I would offer Exhibit
8 DTX 0141.

9 MR. KELLEY: No objection.

10 THE COURT: Received.

11 BY MR. BRIDGES:

12 Q. Mr. Cadenhead, I'll ask you to take me through this
13 document and explain to me what each of these is. If we could
14 please go to the next page?

15 A. Okay. This page lists the things we looked for in notices
16 that we received from copyright holders when we received a
17 take-down notice to forward on to customers. These are the
18 things that we looked for. For instance, there weren't many
19 physical signatures because we were moving to an electronic
20 world, but we wanted an electronic signature or a digital
21 signature, which is a better version of that.

22 We also needed, of course, information about what
23 copyrighted work was in question, and then we, of course,
24 needed to know what material they said was infringing so that
25 when we forwarded, this customer would know what we were

1 talking about, and then information that would help us -- that
2 would allow us to figure out which customer we were dealing
3 with, and I think I described that IP address that is a
4 computer term but gets translated in our systems into customer
5 information.

6 And then, of course, this is drawn out of the DMCA
7 statute, but we also included information that this really
8 was -- that they had a good faith belief that this was
9 infringing and also that the notification itself was accurate,
10 which is a pretty straightforward concept.

11 So this was -- what we were trying to do in this
12 presentation was share what we had pulled together as a model
13 and what we concluded was an effective model for how to manage
14 this. So that's what that page describes.

15 Q. Can you please turn to the next page?

16 A. Yes. It's -- there we go. That's, that's my next page.

17 This is a copy of the cover e-mail that we would send
18 to customers when we received more than one notice, which made
19 us aware that this might be a repeat infringing customer. So
20 we would send this e-mail along with the notice about the
21 infringement and asking that it be taken down. And this is
22 our -- it's a little wordy, I'm sorry to say, but it's our
23 information that goes to the customer to help them understand.

24 So it starts off, "Notice of copyright infringement."
25 Then it says, "We've received a notice claiming that you are

1 infringing on a copyright. The complaint is included. We want
2 you to review it. If it's valid, remove the material" -- or
3 disable access to it, which is another way to describe it, and
4 then let them know that we're sending this because it's our
5 responsibility and that we're required to take appropriate
6 action, if necessary, if you don't resolve it.

7 A little talk about responsibility, which makes --
8 which is important, something we have stressed, and then if you
9 get -- continue to receive notices like this, there is the risk
10 that we'll suspend your account and disable your Internet
11 connection until the problem is solved, and then referencing
12 them to an Internet page that we put up that has a lot more
13 information about the problem, the issue, how it can be
14 resolved for customers, and these came up, have come up --
15 still come up in a number of different ways that we can
16 describe.

17 Q. And what did Cox inform customers about its ability to
18 monitor or control in this notice?

19 A. In this notice, we make sure that we tell people what we
20 tell them in our privacy policy, and that is, we don't know
21 where you go on the Internet, it's not our business, and we
22 make that very clear to the customer, but we do -- when we hear
23 from copyright holders, we take steps to deal with it.

24 Q. Let's go to the next page, please.

25 A. Okay. Okay. I can't read that, but I have a page here.

1 Q. I'll try to blow it up.

2 A. So I'll try to tell you what it says.

3 I don't think it will help. And it's just a
4 presentation, and I prepared it, though I'm not that good at
5 it. But what it says is basically the same thing it says in
6 the e-mail that we just discussed.

7 Q. What is this reference to "walled garden suspension"?

8 A. Ah, okay. Well, this -- I mentioned earlier the idea of
9 the walled garden, and that is, we could take a page, and when
10 the customer goes to their Internet browser, Explorer or
11 whatever it may be, the page they will see initially is a page
12 from Cox, and it's -- we called it a walled garden, I don't
13 know why, but that's what they would see.

14 It has the same kind of information, pretty much the
15 same wording, in fact, and the customer would be faced with
16 that when they went to the, went to the Internet.

17 We used that if -- as a second step, or also if we
18 didn't happen to have, like, a customer's e-mail address to
19 send them the e-mail, we would just go and post this up for
20 them.

21 Q. Let me ask you to look at the next page.

22 A. Oh, good.

23 Q. All right. Can you explain what these numbers reflect in
24 the two different columns and why they differ?

25 A. Ah, yes. This is what I was trying to say. Surprisingly,

1 in the period in which we're talking about, even Cox didn't
2 have an e-mail address for most of its customers at the time,
3 and that was true for a lot of businesses, and it's changed,
4 and it's a good thing, but because of that, we had two separate
5 means of graduating the steps that we had to interact with
6 customers when we had these problems. One was, of course, with
7 the e-mail address, and then the other was if we didn't.

8 So I'll go through the list with you for an e-mail
9 address first, if that's what you'd like.

10 Q. Please.

11 A. The first notice that we would receive for a customer, we
12 would put into our system, mark it that the customer had one
13 notice received, and hold it. We'd keep a record of that.

14 When we received a second notice, we would send the
15 customer an e-mail, and so that's the second step in our
16 process. One was to receive a notice or notices, and then the
17 second step was to send an e-mail warning to the customer.

18 The third step fell into two parts, and you'll see
19 that here: suspend and suspend Tier 2 contact. Those are the
20 walled gardens. So the first time that they saw a walled
21 garden, they would be able to click through that and go on
22 about their business, and you'll see here that we allowed them
23 to do that twice.

24 Then if that didn't get the customer's attention, and
25 it, frankly, almost always did, we would block the customer

1 from being able to go anywhere on the Internet other than our
2 site until they called us and they talked to one of our
3 customer safety team members, who were trained to spend however
4 long it took to get the customer's attention.

5 And then finally, if the customer still didn't get
6 it, didn't fix the problem, didn't change the behavior that was
7 causing the problem, we entered the termination stage. And we
8 worked with the customer. We told them this was their last
9 chance, sometimes we told them more than once that this was
10 their last chance, but when it was clear that that wasn't going
11 to solve the problem, we would terminate the account.

12 And at the time I did this presentation, which was
13 2010, we had terminated 60 customers for just these kind of
14 problems.

15 Now, on the other side of the page, you'll see a
16 different set of things that doesn't have e-mail, and that's
17 because sometimes we didn't have an e-mail address, and if that
18 was the case, we would just go straight to the soft walled
19 garden that I talked about. We'd just post the information
20 right up on their Internet page -- their browser page.

21 Q. What -- there's an asterisk here at "Termination." It
22 says, "Subject to abuse override." Could you explain what that
23 is, please?

24 A. Sure. I referenced that. What I meant by that was what I
25 said, sometimes it took more than once. Sometimes it took a

1 few times, a good number of times on occasion to become
2 convinced that we had a customer that just didn't get it or
3 wasn't willing to go out and fix whatever was causing the
4 problem, like an open WiFi network, and if that occurred, we
5 would tell the customer, you know, if this happens again,
6 you're likely to be terminated.

7 And eventually, if we were -- if the customer service
8 person in customer safety was convinced that it was time, then
9 the customer got terminated. It wasn't something we wanted to
10 do, but we did. It was the right thing to do.

11 Q. Please turn to the next page.

12 A. Okay.

13 Q. Explain this page of your presentation back in 2010.

14 A. We were able to, as I said before, use the CATS system to
15 automate the process a lot. If we had a -- technically, if we
16 had a customer who was Internet and telephone, a manual step
17 had to occur in the process before we could actually suspend or
18 terminate the service, so there was a manual step, and you'll
19 see that referenced there.

20 I've discussed how we track it. And then you'll see
21 here, "No termination without multiple Tier 2 contacts." That
22 was just a fail-safe measure to make sure that the first time
23 that a customer was told by a customer service rep, you know,
24 you're going to get terminated for this, wanted to make sure
25 that that customer service rep wasn't acting out of hand. So

1 we would make sure that at least two termination-level
2 interactions occurred before we pulled the plug.

3 Q. Please turn to the next page, Mr. Cadenhead.

4 A. Okay. This is a sample, blurred out on purpose, of how we
5 would track the receipt of notices in the CATS system that came
6 in electronically, and that's really what that's about.

7 Q. And not all of these are copyright, right? There's
8 something there that's hard to read.

9 A. Yeah. Well, we received other kinds of claims into the
10 CATS system that, that weren't necessarily at all copyright
11 related, but they were very rare.

12 Q. Let's turn to the next page, please.

13 A. Okay. This is a sample page, again blurred out, of a
14 specific customer's record in the CATS system, and you'll see
15 here kind of down at the bottom of the page, there are four
16 lines in one segment, and that -- those were four notices that
17 that customer had received, and it would have records about
18 dates of those notices, and we would be able also to put in a
19 little information that would help us address those.

20 Q. Thank you. Please go to the next page.

21 A. Okay. Good. I mentioned that, let's see, the DMCA was
22 passed in around 1999, and it took a few years for notices to
23 really start to come in, but we started tracking them in about
24 2002, and you'll see how much they grew in a relatively short
25 period of time in terms of numbers, and this was -- I did this

1 work in 2010, and you can see by that time, actually the slide
2 says 1,100,000 notices in one year, and that's, actually turned
3 out to be, for that year turned out to be 1,200,000 notices,
4 and it's grown since then.

5 At that point in time, there were, as I said, still
6 some substantial ISPs that did not have the kind of ability to
7 manage this process the way we had developed it.

8 Q. Let's go to the next page.

9 A. Okay. This contains the same information. It's just a
10 graphical version of the information to show the growth that
11 had occurred in notices.

12 Q. Please go to the next page.

13 A. Okay. Ah, yes. This, this slide indicates the amount of
14 work for the safety team, or, if you will, the abuse team, that
15 they had to deal with for copyright infringement issues. I
16 mentioned that we occasionally got other kinds of tickets in
17 through CATS, but 90 percent of them were take-down notices,
18 these copyright infringement notices, and 90 percent of the
19 calls that came in, because we would post those to customers,
20 were abuse calls.

21 Interestingly, the system seemed to work, because 30
22 percent would pick up the phone and call and reach our Tier 2
23 higher-level service rep the first time they were suspended,
24 that click-through walled garden. And then just the second --
25 the last talks about how many reps we had available at that

1 time to deal with these issues. It was a lot of work, but
2 important work.

3 Q. Please turn to the next page.

4 A. Yes.

5 Q. Please explain what these -- what this slide was as you
6 prepared it in 2010.

7 A. Okay. In a given month, we would receive 100,000 notices
8 a month from copyright holders alleging that a customer had
9 infringed their copyright and asking that the, that the
10 material be taken down. In this particular month that I pulled
11 the information for, which was January, I believe, of 2010, we
12 suspended 8,000 customers, and then I added the note that we
13 had a baseline standard that a copyright holder, which is what
14 the sender is, could only send us 200 notices a day.

15 Q. Why was that?

16 A. We were concerned about two things. We wanted to make
17 sure that the system didn't get overloaded by one copyright
18 holder to the exclusion of all of them that were reaching out
19 to us, and so we tried to manage the flow in, but we also
20 wanted to make sure that we had the staff to answer the calls
21 that resulted from these notices. That's that 30 percent
22 number that I referenced just a minute ago.

23 So what we were trying to do was manage flow.

24 Q. Was that number -- or how much flexibility did Cox have on
25 that point?

1 A. A lot actually. The next page sort of, sort of points to
2 that. We started as a baseline that a copyright holder, we
3 could only accept about 200 a day. We communicated with a lot
4 of copyright holders, and occasionally, some would reach out to
5 us. Sony reached out to me in person and said, our situation
6 is a little different. We're Sony, but we have a bunch of
7 record labels under us, and so we're different.

8 And they were right, and we gave them higher numbers,
9 and they found those acceptable.

10 Q. Who is MediaSentry listed in this?

11 A. MediaSentry was a company that helped manage notices for
12 some -- for a number of, actually, copyright holders. You'll
13 see the bottom the Recording Industry Association of America,
14 which is RIAA, also was sending notices on behalf of actual
15 copyright holders under their umbrella.

16 Q. Please turn to the next page.

17 A. Okay.

18 MR. KELLEY: Your Honor, before we go there -- if you
19 could take that down for a moment? -- we'd like to have a
20 sidebar, if we could, about the last two slides.

21 THE COURT: Okay.

22 (Sidebar on the record.)

23 THE COURT: Yes, sir.

24 MR. ALLAN: Your Honor, I believe there is a motion
25 in limine limiting Mr. Rosenblatt and, I believe, Cox employees

1 from making this very point, that it's effective, in fact, 96
2 percent stop by five notices, because the testimony, the
3 evidence on it is very flawed. They filter out a whole bunch
4 of these notices, and so there's -- having them say they don't
5 give any notices after five -- 96 percent stop after five is
6 wholly misleading because there's 90 percent of the notices
7 that they completely ignore.

8 And Mr. Cadenhead is a lawyer. He's going far beyond
9 the scope of his, of his knowledge and clearly far beyond what
10 Mr. Carothers did as a 30(b)(6) witness, because we didn't have
11 any of this information.

12 MR. BRIDGES: Your Honor, that's perfectly subject to
13 cross-examination. These notice numbers show that they may be
14 lower than other numbers and maybe explain why some get held
15 for more and the like, but the fact is these numbers went down.
16 The, the interactions with the high-level staff were down at
17 the very endpoint of the process, and that, and that the
18 drop-off from one notice to two notices to three to four, this
19 is, I think, relevant, and I think that this is part of the
20 presentation he was making in the industry in 2010.

21 MR. WAKEFIELD: Can I make a point as well? That
22 order came out in connection with in the context of the DMCA
23 being out. Then as this case has come in, the whole thing has
24 been about Cox being guilty with respect to its treatment of
25 Rightscorp, which -- as to which no notice in graduate response

1 issues ever occurred, because if you look at how we treated
2 others, you can infer, you know, bad content.

3 And I had understood your Court's comment being that,
4 well, now they're going to need to put on evidence about how
5 many terminations they did.

6 THE COURT: Well, I did say I would allow evidence of
7 terminations, and I think it's necessary and proper because of
8 the theory of the plaintiff's case. I'm going to allow this
9 in, and you can cross-examine him. Well, we'll wait and see
10 what happens with cross-examination.

11 Is Cadenhead going to talk about the fact that none
12 of these policies were actually implemented? Was he aware of
13 that or not?

14 MR. BRIDGES: Well, Your Honor, I think that's a
15 subject of -- we're staying -- to answer your question, first
16 of all, we're staying away from the DMCA, all right? But we
17 are talking about a gradual response process. He has already
18 testified that the termination is subject to abuse override,
19 and he will discuss what accounts for different outcomes based
20 on his knowledge supervising the system.

21 THE COURT: So you're going to set him up for all the
22 e-mails that talk about the DMCA and we're not going to do this
23 and we're not going to do that?

24 MR. BRIDGES: I don't know that we're going to get
25 there necessarily, Your Honor. I mean, he did supervise that

1 employee.

2 MR. ALLAN: Your Honor, this makes the point as to
3 why the 30(b)(6) deposition of Matt Carothers and the fact that
4 he knew nothing about anything is so important, because we're
5 marching people in here now that are telling us things that the
6 company didn't testify to, and if you look at that deposition
7 transcript, I think it's startling how much he didn't know.

8 I don't know how many times we've seen
9 Matt Carothers, who's the most amazing witness in the world,
10 you know, he developed this amazing system, well, he didn't
11 know anything about anything, and now we're prejudiced, having
12 to cross-examine witnesses, learning information about their
13 system for the very first time.

14 THE COURT: Well, you had this document, right, this
15 exhibit?

16 MR. ALLAN: We did, Your Honor. We did, but the
17 company is obligated to provide a witness knowledgeable to
18 speak on this issue.

19 THE COURT: That's a separate issue because I
20 think -- was Cadenhead deposed on the exhibit?

21 MR. ALLAN: I don't remember.

22 MR. KELLEY: I don't believe so.

23 MR. BRIDGES: I don't think so, but he was deposed
24 partly as a 30(b)(6) and partly as a personal witness. He was
25 wide open.

1 MR. ALLAN: He was not a 30(b)(6) on the policies,
2 Your Honor, on how they deal with any of these issues.

3 MR. BRIDGES: Well, my point is he was also deposed
4 in -- the deposition was personal capacity with the company.

5 THE COURT: All right. I'm going to let the jury go.
6 I've got a Court of Appeals judge that's going to come on the
7 phone at 5:30, and I need to be there.

8 MR. ALLAN: Thank you.

9 MR. BRIDGES: Do you think there will be time for me
10 to get through the last two slides before we break tonight?

11 THE COURT: What time is it?

12 MR. ALLAN: It's getting late.

13 THE COURT: Yeah. No, let's break.

14 MR. ALLAN: Thank you, Your Honor.

15 (End of sidebar.)

16 THE COURT: All right. We're going to break for
17 tonight and come back in the morning at 9:00. We'll continue
18 the testimony at that time. And please, don't discuss the case
19 with anybody and don't do any research or investigation.

20 I hope you have a good evening. We'll see you
21 tomorrow at nine. Thank you.

22 A JUROR: Thank you.

23 JURY OUT

24 THE COURT: All right. Let's be prepared at 8:45
25 tomorrow morning to discuss the matters that Mr. Allan has

1 raised and also if we want to revisit the issues that we
2 discussed at sidebar at that time. Is there anything else? Do
3 you have more deposition designation stuff to give me?

4 MR. WAKEFIELD: I'm actually not sure what's been
5 happening back at the ranch.

6 THE COURT: Okay. Well, I'll be back in chambers,
7 obviously, for a while.

8 Anything else we need to discuss?

9 MR. KELLEY: No.

10 THE COURT: Okay. Then I'll --

11 MR. WAKEFIELD: Actually, one thing very briefly. If
12 I heard correctly, I think I -- I think I heard counsel
13 indicate some concern about Mr. Zabek testifying and a
14 representation that we had said he was never going to testify.
15 I believe he was on our "may call" list and that we did not --
16 in fact, Mr. Buckley, I think, several days ago said he was
17 going to be called. I think that's on the record.

18 THE COURT: All right. Well, you try and work that
19 out.

20 At the beginning of the case -- and sometimes it
21 works, sometimes it doesn't -- but I -- you know, the whole
22 idea by asking you-all to bring issues to me before or at the
23 end of the day was so that we wouldn't have some of the delays
24 we had today with the jury. So let's keep that in mind.

25 And if, you know -- a warning to all counsel: No

1 more slipups about what's been disclosed and what hasn't been
2 disclosed and -- because there are going to be consequences.
3 So let's be real careful about that for the rest of the case,
4 all right?

5 MR. WAKEFIELD: Thank you, Your Honor.

6 MR. BRIDGES: Thank you, Your Honor.

7 THE COURT: All right. Then we're in recess.

8 All right. Mr. Cadenhead, you're in the middle of
9 your testimony, so please don't discuss the testimony you've
10 given so far with anyone, all right?

11 THE WITNESS: Yes, Your Honor. Thank you.

12 THE COURT: See you tomorrow. Thank you.

13 NOTE: The December 9, 2015 portion of the case is
14 concluded.

15 -----

16
17
18 We certify that the foregoing is a true and
19 accurate transcription of our stenographic notes.
20

21
22 /s/ Norman B. Linnell
Norman B. Linnell, RPR, CM, VCE, FCRR

23
24 /s/ Anneliese J. Thomson
Anneliese J. Thomson, RDR, CRR

25